UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

YELLOWPAGES.COM LLC
Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1269
Union

and

DEREK ANDERSON, RONALD WILPON, HEATHER MARINO, CARLA EDWARDS, AND MELONY SHOOK
Petitioners

Case Nos. **28-RD-117449**
22-RD-117441
05-RD-117540
04-RD-117629
06-RD-117644

EMPLOYER'S REQUEST FOR REVIEW

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Pursuant to Section 102.67(b) of the Board's Rules and Regulations, as amended, YellowPages.com LLC (the "Employer") hereby joins the Petitioners in these cases in requesting review of the Decision and Order issued on January 8, 2014 by the Acting Regional Director of Region 28.

INTRODUCTION

The single issue to be addressed by the Board is a determination of when, under the facts of these cases, ratification of a collective bargaining agreement occurred for purposes of erecting a contract bar to forestall the processing of election petitions. In short (the facts will be recited in detail below), the Employer and Local 1269 of the International Brotherhood of Electrical Workers (the "Union") entered into a tentative master collective bargaining agreement covering multiple bargaining units in October 2013[1] containing an express requirement that the affected bargaining units ratify the agreement. The Union undertook a ratification process that entailed the casting of sealed ballots at multiple locations around the country on November 15. No one knew the results of that vote – not the Union, not the employees in the bargaining units, not the Employer – until November 22, when the ballots were counted. In the interim, and before the employees and the Employer were notified that ratification had been accomplished, decertification petitions were filed in five of the bargaining units.

The Acting Regional Director for Region 28 determined, in contravention of applicable Board law and common sense, that the Board's contract bar doctrine

[1] All dates are in 2013 unless otherwise indicated.

operated to avert the processing of the petitions. His finding was premised on a conclusion that the contract was ratified on November 15 at the moment the ballots were cast and not when the results of that vote were first known by the various interested parties on November 22.

GROUNDS FOR REQUEST FOR REVIEW

Review is appropriate under Section 102.67(c)(1)(ii) of the Board's Rules and Regulations, as amended, because the Acting Regional Director erred in failing to rely upon applicable Board precedents that address the question of when ratification is accomplished for contract bar purposes. Under those cases and their policy rationale of acknowledging the existence of questions concerning representation prior to the stabilization of a collective bargaining relationship through a ratified agreement, a petition is only barred when the involved parties – most importantly the bargaining unit employees – know that such a ratification has been accomplished. Furthermore, Board law also recognizes the importance of notifying the Employer of that result.

While the Acting Regional Director did at least acknowledge the Board's 1958 decision in *Appalachian Shale Products*, 121 NLRB 1160, 1162, for the proposition that "'where ratification is made a condition precedent to contract validity, failure to achieve timely ratification of the contract, i.e., before the filing of a petition, will remove it as a bar,'" he inexplicably went on to conclude that "Board law has not directly addressed the question of what act or acts are required to effectuate ratification of a contract in circumstances such as these." *Decision and*

Order at p. 7. What makes this conclusion so poignantly incorrect is the fact that two complementary Board decisions – rendered before and after *Appalachian Shale Products* – were cited and discussed at length in the Brief of the Employer filed with the Regional Director. Reference to those two cases, *Westinghouse Electric Corp., Small Motor Division*, 111 NLRB 497 (1955), and *Swift & Co.*, 213 NLRB 49 (1974), comprised a substantial portion of the Employer's December 16 argument to the Regional Director, noting that due to the requirement of contractual stability for the contract bar to apply, notification of ratification to the employer is a required element of the analysis. Moreover, the Acting Regional Director's decision to ignore those cases is especially suspect, given that they were pure representation cases arising under the Board's Section 9 jurisprudence. Without adequate explanation or even reference to those authorities, the Acting Regional Director instead chose to rely primarily on unfair labor practice cases arising under Section 10 of the Act.

The Acting Regional Director's Decision is erroneous in determining that ratification for contract bar purposes occurred at the time ballots were cast and before anyone, including the affected bargaining unit and even the Union, knew the results of that vote one week later. Therefore, the Board should rule that a contract bar arises only upon the Employer's receipt of notice that ratification has been accomplished, or in the alternative, upon the bargaining unit employees' receipt of such notice. Only under such a rule would the policy rationale of permitting employees to raise questions concerning representation prior to the stabilization of a collective bargaining agreement be satisfied. The Acting Regional Director's Decision ignores that policy entirely.

To the extent the Board is reticent to determine that these cases are controlled by a bright line rule, it still should reject the Acting Regional Director's Decision, because under the facts of these cases, not even the Union viewed ratification to have occurred at the time the ballots were cast. Board law respects a union's prerogative to determine internal ratification processes in the absence of express agreements limiting that right. But it is folly to suggest that the Union's internal processes here demand a finding that ratification occurred as of the time the ballots were cast. Rather, the facts clearly demonstrate that the Union – like the Employer and the bargaining unit employees – understood and acted as if there was a ratified collective bargaining agreement only after the ballots were counted.

FACTUAL BACKGROUND

After bargaining for several years, the Employer and the Union reached a second tentative agreement for the Employer's Digital Region on October 17.[2] (Er. Ex. 1). According to the terms of that agreement, which was intended to cover all of the bargaining units which have filed the instant petitions and several others across the country, it would be "adopted" upon "ratification by the bargaining unit and Board approval[.]" (Tr. 126-27; Er. Ex. 1, p. 1). The Employer's Board of Directors pre-approved the substantive terms of the second tentative agreement in June. (Tr. 126).

In the aftermath of the October tentative agreement, the Union and the Employer planned a joint presentation of the agreement's terms to all of the

[2] The parties' first tentative agreement was reached in June and rejected by the employees in August. (Tr. 62-63, 126).

bargaining units nationwide via a simultaneous internet-based presentation and conference call. (Tr. 127-130). That meeting occurred on November 15. (Tr. 38-39; Er. Ex. 2). At the conclusion of the November 15 meeting, the employees present at each of the multiple meeting locations cast their votes on secret ballots which, without being counted, were gathered and sealed in a single envelope for each office to be sent to a central location for counting. (Tr. 40; U. Ex. 3, p. 2). According to the Union's announcement of its procedure, the plan was that the "point person for [each] office will…collect all ballots before you leave and FedEx the[m] back to the union office where they will be counted when ALL are received." (U. Ex. 3, p. 2) (emphasis in original). The Union followed this procedure, and despite the fact that receipt of some of the ballots was delayed because one of the bargaining units chose to use regular U.S. mail instead of FedEx, the Union waited until all of the ballots were received to perform its count on the afternoon of November 22. (Tr. 137; U. Ex. 5). Further, instead of unsealing and counting the ballots in San Francisco immediately upon receipt from all of the bargaining units, the Union chose to have its representatives personally transport the multiple sealed envelopes to Henderson, Nevada for opening and tallying, delaying the vote count by at least one day. (Tr. 75, 112).

A committee of Union representatives opened and tallied the votes between 3:00pm/noon[3] and 3:30pm/12:30pm on November 22. (Tr. 49). No one in the Union's leadership knew the results of the vote prior to opening the ballots. (Tr. 74). The Union announced to the bargaining unit employees that the agreement had

[3] Because of the application of facts across time zones, all times are quoted in both Eastern and Pacific time.

been ratified in an email entitled "Digital Region Ratification Vote Results November 22, 2013" at 4:57pm/1:57pm on November 22. (U. Ex. 7). The Union's Business Manager/Financial Secretary Peter Pusateri notified the Employer's Vice President of Labor and Employee Relations Keith Halpern by telephone that the contract had been ratified in a seven-minute phone call that started at 5:04pm/2:04pm on November 22. (Tr. 145; Er. Ex. 4). Mr. Halpern confirmed receipt of the ratification notification in an email to Mr. Pusateri at 5:50pm/2:50pm and began the process of getting the contract put into final form for signing and then implementation. (U. Ex. 8, p. 2).

PROCEDURAL HISTORY

All of the decertification petitions at issue were filed prior to the Union counting the ballots and notifying either the employees or the Employer that the contract had been ratified. The petitions covering the Employer's Richmond, Virginia office, its two New Jersey offices, and its Henderson, Nevada premise sales office were filed on November 20. (Bd. Exs. 1(a), 1(d), 1(g)). Region 4 received the petition covering the Conshohocken, Pennsylvania office at 1:30pm/10:30am on November 22. (Bd. Ex. 1(j)). Region 6 received the petition covering the Pittsburgh, Pennsylvania office at 4:18pm/1:18pm on November 22. (Bd. Ex. 1(m)).[4]

[4] Decertification petitions for the Employer's offices in Queens, New York and Melville, New York were filed before the five petitions at issue in these cases, on November 12 and November 13, respectively. (Case Nos. 29-RD-116718 and 29-RD-116963). The Union disclaimed interest in both of those bargaining units on November 19, and the Regional Director of Region 29 subsequently dismissed the petitions in both of those cases.

On November 25, the Employer filed with the General Counsel a Motion to Consolidate Proceedings pursuant to Section 102.72 of the Board's Rules and Regulations, as amended, with respect to the five petitions. (Bd. Ex. 1(t)). At the conclusion of that Motion, the Employer proposed "Region 22 as a logical location for the hearing, as four of these five petitions are filed within close proximity of that office (New Jersey, metro Philadelphia, Pittsburgh, and Richmond), with a petition in Las Vegas being the sole outlier." (Bd. Ex. 1(t)). Nevertheless, the General Counsel ordered on November 29 that the cases would be consolidated for hearing in Las Vegas.[5] (Bd. Ex. 1(w)). There was no attendant explanation as to the General Counsel's reason in setting the hearing in a location three time zones from 80% of the units covered by the consolidated proceeding.

The hearing to decide the issues common to all five cases was held before Resident Officer Stephen E. Wamser at Region 28's offices in Las Vegas, Nevada on December 9. Testifying at the hearing were Union Business Manager/Financial Secretary Peter Pusateri, Union Business Agent Karen Gowdy, Employer Vice President of Labor and Employee Relations Keith Halpern, former Employer Director of Labor and Employee Relations Jon Irelan, and Petitioners Ronald Wilpon and Melony Shook. Briefs were submitted on December 16. Acting Regional Director Michael J. Karlson issued his Decision and Order on January 8, 2014.

[5] The reinstated Conshohocken, Pennsylvania petition was consolidated for hearing with the other four petitions on December 3. (Bd. Exs. 1(aa) and 1(ae)).

ARGUMENT

I. The Decision and Order is in error because it is not grounded in the Board's contract bar jurisprudence, which provides that a petition is barred only if it is filed after the employer is notified of ratification.

The Acting Regional Director erred in concluding that the petitions were untimely and that the contract bar doctrine applied. Under extant Board law and everyday logic, ratification of the contract – and the cutoff point for the filing of decertification petitions – occurred at approximately 5:04pm/2:04pm on November 22, when the Union notified the Employer that the employees approved the agreement. All of the petitions were filed prior to this threshold time and should be processed.

The Board's seminal case on the timing of ratification in contract bar cases is *Appalachian Shale Products*, 121 NLRB 1160 (1958). There, the Board explained that "[t]he general rule is that where ratification is made a condition precedent to contract validity, failure to achieve timely ratification of the contract, i.e., before the filing of a petition, will remove it as a bar." *Id.* at 1162 (*citing Westinghouse*, 111 NLRB at 497). As is the case in the parties' tentative agreement here, "[w]here ratification is a condition precedent to contractural validity by express contractural provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition. . . ." *Id.* at 1163.

A fuller explanation of the policy reasons behind the contract bar doctrine's application in the ratification context is found in *Westinghouse*, the predecessor to *Appalachian*, in which the Board explained that

> a provision requiring ratification of a collective-bargaining agreement for a stated term must, in our opinion, be satisfied before such contract may operate [as a] bar. . . . The Board has recognized that stabilization of the bargaining relationship is a necessary element in the application of the contract-bar doctrine. Accordingly, failure to effect ratification where it is contemplated as the final step in the bargaining process, prevents the contract from operating as a bar for the reason that until ratification occurs, the relationship between the contracting parties cannot be deemed stabilized. We therefore find that, as the instant petition was filed before ratification of [the agreement] had occurred and notice thereof was received by the Employer, the [agreement] is not a bar to this proceeding.

111 NLRB at 499 (footnotes omitted); *see also American Broadcasting Co.*, 114 NLRB 7, 8 (1955) ("Where a contract contemplates ratification, the relationship between the parties cannot be deemed stabilized until ratification occurs"). Thus, the *Westinghouse* Board recognized that notification to the employer is a critical element in determining whether contractual stability is achieved and the contract bar applies.

In *Westinghouse*, the employer and the union agreed that a contract would be effective upon ratification, and they set a deadline for achieving such ratification. The union waited until the final day to notify the employer that the contract had been ratified. A rival petition was filed 10 days before the union gave notice of ratification to the employer. *Id.* at 498-99. No mention was made of the date that the ratification votes were cast, underscoring the irrelevance of that date in the analysis. Because the petition was filed before the employer was notified of the ratification, it was not barred. *Id.*

The requirement of notice to effect ratification is also seen in *Swift & Co.*, 213 NLRB 49 (1974). In that case, the employer and the union reached an agreement that was subject to ratification that would apply to multiple local unions in different

locations. Though the parties' core dispute in that case was whether ratification by every local union was necessary or the union could pool votes to garner majority approval, the manner in which the Board discussed when ratification occurred is instructive here. The Board explained that "ratification had been accomplished" when (a) the union had knowledge that a majority of the vote's participants had voted in favor of the agreement, and (b) the union communicated that result to the employer. *Id.* at 49-51. Because those two events occurred prior to the filing of the petition at issue, it was barred. *Id.* at 50-51. As the Board summarized, "a binding contract was arrived at upon the Employer's receipt of the notice of ratification." *Id.* at 51.

The Acting Regional Director does not cite any of these cases. Indeed, his Decision does not even touch on the policy rationale behind the contract bar doctrine. No mention is made of the stabilization of the bargaining relationship or the time at which that occurred under the facts of these cases. It would be difficult for him to have done so and reached the same result, because it is clear that the parties could not have objectively perceived such stability on November 15. Stability was not achieved until 5:04pm/2:04pm on November 22, and only petitions filed after that moment should be barred.[6]

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[6] Though obviously not controlling, the arbitrator's logic in *Guy's Food* is persuasive:

> Another argument made by the Union is that "ratification" of the agreement is retroactive to August 16. Once again, I disagree. "Agreement ratification" has a specific meaning in labor relations, namely, "Formal approval of a newly negotiated agreement by a vote of the general membership or union members affected as required in Union constitutions, by-laws or tradition." (*See Robert's Dictionary of Industrial Relations*, 4th Edition, p. 27). Therefore, "ratification" of the

Instead of citing relevant case law, the Acting Regional Director made a strained comparison to the Section 8(a)(5) initial refusal to bargain cases of *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974), *enf. denied on other grounds*, 512 F.2d 684 (8th Cir. 1975), and *Dow Chemical Co.*, 660 F.2d 637 (5th Cir. 1981). Those cases are inapposite because they present wholly different questions of law and policy. In the contract bar cases, the operative policy question is whether employees' Section 7 right to raise a question concerning representation is outweighed by stability that has already been established between a union representing them and their employer. *Mike O'Connor* and its progeny are also policy driven cases, but there the goal is to avoid "the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued." 209 NLRB at 703. That unfair labor practice theory does not square with, or even resemble, the considerations inherent in determining whether there is a new question concerning representation presented in an employee petition.

The limited usefulness of the Acting Regional Director's comparison of these Section 9 cases to Section 10 case law is revealed in his selective quotation of *Howard Plating Industries*, 230 NLRB 178, 179 (1977). In that case, the Board held that it is not an unfair labor practice for an employer to choose to not convene

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> new agreement cannot be said to have taken place before the ballot approving the new agreement was tallied, namely, on October 27. Of course, terms of the agreement that are "ratified" may be applied retroactively, but "ratification" cannot be said to have occurred before it actually has occurred.

112 LA 1133, 1136 (Cipolla, 1999).

bargaining sessions with a union while the employer's election objections are pending. Therefore, though the parties know the likely results of a Board-administered election, there is no immediate bargaining obligation. Though the comparison is admittedly tenuous (it is the Acting Regional Director who embarked on this path, not the Employer), the Board's holding in *American Broadcasting*, *supra*, as compared to *Howard Plating Industries* is relevant. In that case, the Board rejected an incumbent union's request that a rule be established that would protect its status as the employees' exclusive bargaining representative in the time between its tentative agreement with the employer and the completion of the ratification process. 114 NLRB at 8. As in *Howard Plating Industries*, in which it was established there is no bargaining obligation pending final resolution of objections, under *American Broadcasting* there is no contract bar until ratification is achieved, even while a tentative agreement is in place and out for ratification, permitting a putative petitioner to raise a question concerning representation.

The Acting Regional Director's extension of the contract bar period to encompass the period between the casting of ratification ballots and the tallying of them is much like the extension of the bargaining obligation that the Board refused to accede to in *Howard Plating Industries.* Indeed, in this respect it appears that by stretching the application of the contract bar window, the Acting Regional Director is effectively overruling the "old rule" discussed in *Deluxe Metal Furniture* that "remained unchanged" then and still does over 50 years later – that "an initial contract. . . does not bar an election if a petition is filed with the Board before (a) the execution date of the contract where the contract is effective immediately or

retroactively; or (b) the effective date of the contract where the contract goes into effect at some time subsequent to execution. . . ." 121 NLRB 995, 999 n. 6 (1958). *See also Hotel Employers Ass'n of San Francisco*, 159 NLRB 143, 146 (1966) ("Although the terms of this agreement applied retroactively, it is well established that contracts signed after the filing of a petition cannot serve as a bar"). There is no indication in the record whatsoever that the parties intended for the agreement to be retroactive to the date the ballots were cast. And even if retroactivity was the intention, under *Deluxe Metal Furniture*, the effectuation date of the contract controls for contract bar purposes, not the retroactive applicability date. The Acting Regional Director is wrong when he states "the fact that the parties may not have acted as though an agreement is in effect is immaterial to the actual effectuation date of the agreement."[7] *Decision and Order* at p. 8, n. 5. For contract bar purposes, such a review is required under *Deluxe Metal Furniture*.

The Acting Regional Director's reliance on *United Health Care Services, Inc.*, 326 NLRB 1379 (1998), for anything other than well-settled Board law that is also derivable from other cases is inappropriate, because it is not authoritative precedent. In that case, an equally divided four-member Board panel denied review of a Regional Director's Decision and Order. In such a case, an affirmance issues only because there is no majority to reverse it; the decision below has no precedential weight. *See Durant v. Essex*, 74 U.S. 107, 113 (1868) (equal division "prevents the decision from becoming an authority for other cases of like character"). Moreover, the two Board members who would have denied review and

[7] Further discussion about the importance of the parties' actions in effectuating the agreement is found at pp. 16-20, *infra*.

upheld the Regional Director's decision on the merits focused only on that portion of the decision below in which the employer improperly called into question the mechanics of the union's internal ratification procedure. *Id.* at 1379. Therefore, contrary to the Acting Regional Director's analysis, the Board has not effectively adopted the rationale of the Regional Director in *United Health Care Services* who relied upon the Section 8(a)(5) repudiation case of *Felbro, Inc.*, 274 NLRB 1268 (1985), for the principle that notification to the employer is not an essential element of ratification.

The Board should not accept the *Felbro* notice rationale in these cases either. Like the apples-to-oranges comparison made by the Acting Regional Director in comparing these contract bar cases to Section 8(a)(5) initial refusal to bargain cases, the policy drivers behind Section 8(a)(5) repudiation cases also materially differ from the policy behind the Board's contract bar cases. In repudiation cases, the Board abhors employers' technical contract law arguments to avoid obligations under collective bargaining agreements, holding that national labor policy prefers the establishment of such agreements. *See Felbro*, 274 NLRB at 1282. That logic simply cannot apply in the instant context, where the stability derived from ratification of a collective bargaining agreement is a necessary precondition to the dismissal of a petition on contract bar rules. While notice of ratification may be a negligible consideration in Section 8(a)(5) repudiation cases, it is crucial in contract bar cases.[8]

[8] As discussed at p. 12, *supra*, the Board in *American Broadcasting* refused to establish a rule that would insulate, for contract bar purposes, a union that had reached a tentative agreement with an employer that had not yet been ratified. A

Following *Westinghouse* and *Swift*, the Acting Regional Director should have determined that all of the petitions were timely filed, because they were all submitted prior to the Employer's receipt of notification from the Union at 5:04pm/2:04pm on November 22 that ratification had been accomplished. Under those cases, notice to the employer is required to establish the stability necessary to erect a contract bar.

Though the requirement of notice to the employer is the appropriate rule under *Westinghouse* and *Swift*, the required policy analysis of searching for the moment of stability would also be satisfied by a rule providing that notice to bargaining unit employees that ratification has occurred is what is sufficient to erect a contract bar. Such a rule would be reasonable, because employees might perceive a stable collective bargaining relationship between their employer and their union if they know that as a group they had ratified the contract, even if their employer did not yet know. Thus, applying the contract bar to dismiss a petition filed between the

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petition is valid if it is filed before ratification is accomplished. *American Broadcasting*, 114 NLRB at 8. Therefore, the arguable rule in *Felbro* that an employer may not repudiate while an agreement is out for ratification is directly inapplicable in the contract bar context. That said, there may not be much left of *Felbro* in the wake of *American Protective Services*, 113 F.3d 504 (4th Cir. 1997), *denying enf. to* 319 NLRB 902 (1995) (employer may withdraw final offer before union completes ratification process where it has good faith doubt as to union's continued majority status). And, even if *Felbro* had any precedential value, its facts are distinguishable in two critical respects that would directly affect a contract bar analysis. First, the employees in that case knew of the results of their vote immediately after their votes were cast. 274 NLRB at 1272, 1277. Here, it is clear that the employees could not have believed that ratification occurred on November 15 because they did not hear the results of the vote until 4:57pm/1:57pm on November 22. Second, the employer in *Felbro* was put on notice of the ratification two days before the official notification followed and proceeded with processing grievances as if the contract had passed. *Id.* at 1277, 1282. The Employer here received no such informal notification and engaged in no implementation of the contract's terms prior to November 22.

moment of bargaining unit employees' knowledge and subsequent employer knowledge could also be sensible. If that rule were applied in these cases, all of the petitions would survive, since the employees were notified at 4:57pm/1:57pm on November 22, and the last of the petitions was filed at 4:18pm/1:18pm.

Whether the Board determines that notice to the employer is a necessary precondition for ratification to bar a petition, or that notice to the bargaining unit employees is what is required, the instant petitions should be processed and elections directed. Determining that ratification occurred at the time the ballots were cast on November 15 is a legally and factually incorrect rule, and the Acting Regional Director's decision should not be affirmed. No one knew of the vote results that day, as the ballots remained sealed in their original envelopes until November 22. (Tr. 76, 114). Considering a contract to be ratified at such an early and illogical stage does not further the core policy rationale of stability.[9]

II. By its own conduct, the Union has conclusively demonstrated that ratification of the collective bargaining agreement occurred on November 22, not November 15.

The Employer concurs in the Acting Regional Director's citation to *New Process Steel*, 353 NLRB 111 (2008), for the proposition that the Board will not allow an employer to pierce a union's internal procedures to challenge the manner in which it achieves ratification. Only in very limited circumstances, e.g., where an employer and a union bargain for a specified ratification procedure, does an

[9] Should the Board determine that it is appropriate to adopt the Acting Regional Director's logic, and to scuttle *Westinghouse* and *Swift*, application of that rule should be prospective only. Applying this new rule retroactively would cause "manifest injustice" to the Petitioners and their reasonable expectations regarding the manner in which they could exercise their Section 7 rights. *SNE Enterprises*, 344 NLRB 673, 673 (2005).

employer have a right to insist on specific processes or requirements. *See*, *e.g.*, *Beatrice/Hunt-Wesson*, 302 NLRB 224, 224 n. 1 (1991) ("the Respondent and Union here agreed that ratification by bargaining unit members was a precondition to the contract and discussed the ratification process. Thus ratification was clearly definite and not left to the Union's internal procedures").

Those limited circumstances do not exist in these cases. The Employer concedes that it did not bargain with the Union as to the specific niceties of how the ratification process would operate. That being said, there is nothing whatsoever in the record to suggest that the Union's internal processes provide that ratification would be deemed to occur at the moment the votes were cast. In fact the opposite is true; the record is littered with indications that not even the Union believed that the contract was ratified on November 15. Only after the votes were counted on November 22 did the Union begin to act as if there was a collective bargaining agreement.

Under *New Process Steel* and similar cases, the Board leaves to the Union the latitude to decide what its ratification process entails. By advancing the position here that ratification occurred for contract bar purposes on November 22 rather than November 15, the Employer is not attempting to pry into the Union's internal process. In the absence of any evidence that the Union's internal process would deem the ratification to occur at the time ballots are cast (there is none), the Board is left to review the parties' course of conduct.[10]

[10] Even if there were such evidence in the record, it would be inappropriate for the Board to rely upon it. This is not a situation in which there is some disagreement as to what ratification means, like in *New Process Steel*, where the employer attempted

Union Business Agent Karen Gowdy testified that the Union had no written internal procedures regarding vote counting or when the votes would be effective. (Tr. 118-120). And, as the Employer's Vice President of Labor and Employee Relations Keith Halpern testified, the Employer's discussions with the Union regarding ratification did not include any claim that the Union would view ratification to have occurred at the time ballots were cast. (Tr. 133-34). Finally, as New Jersey Petitioner Ronald Wilpon testified, the Union did not tell the voting employees that ratification would be deemed effective as of the time their ballots were cast on November 15.[11] (Tr. 173). Thus, there is no evidence that the Union's internal procedures operate to dictate a November 15 ratification date.

It is undeniable that the Employer and the Union did not believe that there was a contract in place in the week after the ballots were cast on November 15. The Employer took no steps to implement the contract prior to learning of its ratification on November 22. (Tr. 148). As Mr. Halpern testified, he was in constant communication with Union officials between November 18 and 21 trying to ascertain whether the vote count had taken place so that the Employer could begin

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to invalidate the union's claim that the contract had been ratified at all. Here, both the Employer and the Union shared the understanding that ratification meant majority approval by those casting ballots. Both parties agree that the agreement was ratified. *Whether* ratification occurred is the province of internal union procedure. *When* the ratification occurred for contract bar purposes is a legal conclusion that the Board must make independently.

[11] When Pittsburgh Petitioner Melony Shook was called to testify, counsel for the Union sought to pretermit her testimony by asking the Employer to tender an offer of proof, suggesting that her contributions would likely be duplicative. (Tr. 176). The Employer did not intend to offer her testimony to be cumulative, and she proceeded to testify regarding other issues. Nonetheless, the Union seemed satisfied to concede that all employees who attended the November 15 meetings would testify that the Union never told employees that its internal procedures dictated that the contract would be deemed ratified at the time the votes were cast.

the process of implementing the contract. (Tr. 135-39). He did not believe there was a contract in place prior to November 22. (Tr. 147-48). The Union cannot point to any evidence that the parties believed their contract was in effect before the votes were tallied and the results were communicated. Most illustrative is the Employer's continued negotiation with the Union over disciplinary actions during the week of November 18, an obligation which the Employer was complying with pursuant to *Alan Ritchey*, 359 NLRB No. 40 (2012). On two separate occasions – on November 18 and 19 – Mr. Halpern and Labor and Employee Relations Manager Shirley Glynn corresponded regarding their continued plan to negotiate discipline with the Union in the absence of a contract. (Tr. 152-54; Er. Exs. 5, 6). Mr. Halpern also testified, without refutation by the Union, that he and Ms. Glynn did in fact bargain over a disciplinary issue with the Union on those days. (Tr. 152-53). Surely, if the Employer had failed to bargain over discipline with the Union as required under *Alan Ritchey* in the period between November 15 and November 22, the Union would have cried foul and potentially filed unfair labor practice charges. And it would have been justified in doing so, as there was no grievance and arbitration procedure in place that would obviate the need for pre-disciplinary bargaining under *Alan Ritchey.*

The Union elicited no evidence to suggest that the parties proceeded as if the contract were in effect at any time prior to notifying the Employer of ratification on November 22. In fact, the best evidence of the employees' (and, because of the particular employee's status as a steward, the Union's) state of mind is found in Employer Exhibit 7. In that email of 6:45pm/3:45pm on November 22, Union

steward and Charlotte, North Carolina employee Maureen Mahood complained about the Employer's Henderson, Nevada General Manager informing employees of the increased sales requirements under the new compensation plan. As Ms. Mahood put it, "[w]e barely announced this 2 hours ago. It[']s a little aggressive to start with that already." (Er. Ex. 7). It is clear from this exchange that Ms. Mahood did not believe there was a contract until the ratification had been announced approximately two hours prior.[12]

Applicable Board law and common sense dictate that ratification of the parties' collective bargaining agreement occurred at approximately 5:04pm/2:04pm on November 22 when Union Business Manager/Financial Secretary Peter Pusateri informed Mr. Halpern of the vote results. Determining that ratification occurred at any earlier moment in time – especially the moment the votes were cast, on November 15 as found by the Acting Regional Director – would be legally and factually incorrect.[13]

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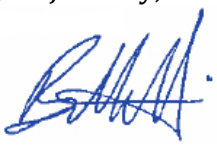
[12] The news of ratification apparently had not yet reached Ms. Glynn, as she expressed surprise that there was a contract in place. (Er. Ex. 7).

[13] The absurdity of the Acting Regional Director's ruling that ratification occurred at the moment ballots were cast on November 15 is borne out in the Union's actions with respect to the Employer's Queens and Melville, NY offices. Additional decertification petitions were filed regarding those offices on November 12 and 13, respectively. Those petitions would not be barred even under the Acting Regional Director's ruling. But the Union chose to disclaim interest in those units on November 19. (*See* http://www.nlrb.gov/case/29-RD-116718). While the Union's counsel was correct at the hearing when he argued that a union may disclaim interest at any time for any reason (Tr. 79), it is difficult to understand why the Union on November 19 would abandon a brand new contract covering approximately two dozen dues payers in a non-right-to-work state that had been ratified just four days earlier on November 15. The answer, of course, is that the Union did not know (and probably did not believe in its heart of hearts until it constructed its post hoc argument) that the contract was ratified on November 15. It was ratified on November 22.

CONCLUSION

The Petitioners put it succinctly in their Request for Review, and they got it right: "you can't say that a contract is in place before you count the votes." The Acting Regional Director's Decision and Order is not grounded in Board contract bar law and does not comport with common sense notions of what it means to ratify a collective bargaining agreement. For that reason, the Board should grant review and instruct the five Regional Directors to direct elections in these cases.

Respectfully submitted this 31st day of January, 2014.



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

YELLOWPAGES.COM LLC
Employer

and **Case Nos.** **28-RD-117449**
22-RD-117441
05-RD-117540
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1269 **04-RD-117629**
06-RD-117644
Union

and

DEREK ANDERSON, RONALD WILPON, HEATHER MARINO, CARLA EDWARDS, AND MELONY SHOOK
Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, I e-filed the foregoing Employer's Request for Review using the Board's e-filing system, and served the same by email on the following:

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